Bitutech Sdn Bhd & Ors v Bosco Philip Anthony & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–(S6)–23–92 0F 1999

KAMALANATHAN RATNAM J

12 OCTOBER 2000

Civil Procedure *— Striking out — Pleadings — Striking out statement of claim — Appeal against registrar's decision in allowing application to strike out — Rules of the High Court 1980 O 18 r 19*

Tort *— Defamation — Libel — Libellous statement in e-mail — Allegation that plaintiff had not conformed with court order and an order from the Majlis Perbandaran Selayang — Whether first defendant acting as agent or servant for third defendant — Whether constructive knowledge can be attributed to the third defendant*

At all material times, the second, third and fourth plaintiffs were the directors of the first plaintiff, whereas the first defendant was the advocate and solicitor of the second and third defendants. On 12 July 1999, the first defendant obtained an ex parte order for an injuction to restrain the plaintiffs from manufacturing products that may pollute the surrounding area of Sungai Buloh. This order lapsed on 22 July 1999 and an application to extend the order was dismissed by the High Court in Shah Alam on 22 July 1999. On 3 August 1999, the first defendant issued an e-mail to the Yang Di-pertua Majlis Perbandaran Selayang and to the director, Department of Environment, State of Selangor stating that the first plaintiff had not ceased its operations notwithstanding the court order and an order from the Majlis Perbandaran Selayang (through a letter dated 30 June 1999) to the first plaintiff to cease operations. The plaintiffs took the words to mean that they had wilfully disobeyed the injunctive order of the court and thereby had been brought into public scandal, odium and contempt, and sued the defendants in libel. The third defendant applied to strike out the claim against him under O 18 r 19(1)(a), (b) and (c) of the Rules of the High Court 1980. In his supporting affidavit, the third defendant averred that he did not instruct the first defendant to send the e-mail and that the e-mailer was neither his agent nor his servant. The learned senior assistant registrar allowed the third defendant's application and the plaintiffs appealed.

Held, dismissing the appeal with costs:

The first defendant had expressly stated that he sent the e-mail on his own and without the instructions of the third defendant. It cannot be said then that constructive knowledge must be attributed to the third defendant. This admission must be taken together with the fact that the solicitor himself was the first defendant, and was also acting for himself with an interest in the matter in question. Once this evidence

was before the court, it did not think it was necessary to hear from the respondent (see p 280G–H).

[**Bahasa Malaysia summary**

Pada semua masa yang material, plaintif-plaintif kedua, ketiga dan keempat adalah pengarah kepada plaintif pertama, manakala defendan pertama adalah peguambela dan peguamcara kepada defendan-defendan kedua dan ketiga. Pada 12 Julai 1999, defendan pertama telah memperoleh perintah ex parte untuk injunksi untuk menghalang plaintif-plaintif daripada membuat produk-produk yang mungkin mencemarkan kawasan Sungai Buloh. Perintah tersebut luput pada 22 Julai 1999, dan Mahkamah Tinggi Shah Alam telah, pada 22 Julai 1999, menolak permohonan untuk melanjutkan perintah tersebut. Pada 3 Ogos 1999, defendan ketiga telah menulis e-mail kepada Yang di-pertua Majlis Perbandaran Selayang dan kepada pengarah Jabatan Alam Sekitar, Negeri Selangor, menyatakan bahawa plaintif pertama gagal menghentikan kerja-kerjanya walau apa pun perintah Mahkamah dan perintah daripada Majlis Perbandaran Selayang (melalui sepucuk surat bertarikh 30 Jun 1999) kepada plaintif supaya menghentikan kerja-kerjanya. Plaintif memaksudkan perkataan-perkataan tersebut sebagai mengatakan bahawa mereka telah mengingkar perintah injunksi Mahkamah dengan sengaja dan dengan itu telah membawa kepada skandal awam, kebencian dan penghinaan dan telah menyaman defendan-defendan dalam libel. Defendan ketiga telah membuat permohonan untuk membatalkan tuntutan plaintif dibawah A 18 k 19(1)(a), (b) dan (c) Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan ketiga telah, didalam afidavit sokongannya, menyatakan bahawa defendan pertama bukan merupakan agen atau pengkhidmatnya dan beliau tidak pernah meminta penulis e-mail tersebut menghantar e-mail tersebut. Penolong kanan pendaftar yang arif membenarkan permohonan defendan ketiga dan pihak plaintif merayu.

Diputuskan, menolak rayuan dengan kos:

Defendan pertama telah dengan nyatanya berkata bahawa beliau telah menghantar e-mail tersebut dengan sendiri tanpa arahan daripada defendan ketiga. Maka defendan ketiga tidak boleh dikatakan mempunyai notis konstruktif. Pengakuan ini mesti diambil dengan fakta bahawa peguamcara adalah defendan pertama, dan beliau juga sedang bertindak untuk dirinya sendiri dengan mempunyai kepentingan didalam hal tersebut. Mahkamah berpendapat bahawa responden tidak perlu memberi keterangan setelah keterangan itu didengar (lihat ms 280G–H).]

Notes

For cases on defamation, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 193–409.

A For cases on striking out, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4335–4344.

Cases referred to

Boursot v Savage (1866) Vol II LR 134 (refd)
B *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 rr 19(1)(a), (b), (c)

Edwin Lim (*Y Y Ho with him*) for the plaintiffs.
C *S Vanitha* (*Allen & Gledhill*) for the second defendant.
H P Lee (*H P Lee & Co*) for the third defendant.

Kamalanathan Ratnam J:

Facts

D The second, third and fourth plaintiffs are directors of the first plaintiff. The first defendant is an advocate and solicitor whose clients were the second and third defendants at all material times. Acting on behalf of the second and third defendants, the first defendant obtained, on 12 July 1999, an ex parte order for an injunction, inter alia, restraining the plaintiffs from E manufacturing any products which may pollute the surrounding area of Sungai Buloh in Selangor. The ex parte order lapsed on 25 July 1999 and the defendants' application to extend the order was dismissed with costs by the High Court at Shah Alam on 22 July 1999. In an e mail dated 3 August 1999, issued by the first defendant and addressed to the Yang Di-pertua Majlis Perbandaran Selayang, and to the Director, Department of F Environment, State of Selangor, the first defendant had said that notwithstanding the order of the court and the letter from the Majlis Perbandaran Selayang dated 30 June 1999 directing the said first plaintiff to cease its operations, the said first plaintiff was continuing with the operations and that he had received a report from his clients that the polluting of the area was continuing. He further stated that his clients were G disappointed and were wondering when the pollution being caused by the first plaintiff would be overcome. The plaintiffs took the words stated in the e mail, in their natural and ordinary meaning to mean that the plaintiffs had wilfully disregarded or disobeyed the injunctive order of the court by continuing to operate the manufacturing plant and polluting the environment. Contending that they have thereby been brought into public H scandal, odium and contempt and that their reputation thus being injured, the plaintiffs sued the defendants in libel.

The third defendant's application

The third defendant applied to strike out the claim against him pursuant to I O 18 r 19(1)(a), (b) or (c) of the Rules of the High Court 1980 on various grounds and the relevant ground being that the e-mailer was neither the third defendant, nor was he the servant or agent of the third defendant.

In his affidavit in support, the third defendant averred that he did not instruct the first defendant to send the e-mail to either or both of the recipients. He averred that even the first defendant was a resident of that area and was a committee member of BRP 5 (Bukit Rahman Putra 5), of which the second defendant was the head. The third defendant averred that he was not even a member of this committee. Having heard the arguments, the learned senior assistant registrar ('SAR') allowed the third defendant's application on 30 May 2000 with costs. Being dissatisfied with that decision the plaintiffs have appealed.

Findings of the court

At the commencement of the appeal, all parties agreed that when the first defendant submitted before the learned SAR, he confirmed that he did not act on behalf of the second and third defendants when he sent the said e-mail to the Yang Di-pertua Majlis Perbandaran, Selayang and to the Director, Department of Environment, State of Selangor. Mr Edwin Lim, for the appellant, referred me to a passage from *Boursot v Savage* (1866) Vol II LR 134, wherein Sir RT Kindersley VC said at p 142 as follows:

> … I confess my own impression is that the principle on which the doctrine rests is this: that my solicitor is alter ego; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable.

That case related to the client being held to have had constructive notice of the existence of a trust through the knowledge of the existence of such trust by his solicitor, I fail to see how that case can assist the appellant. In the case before me, the solicitor himself is involved personally as an interested litigant. He also acted for the third defendant. In the course of the hearing, he expressly stated that he sent the e-mail on his own and without the instructions of the third defendant. How then can it be said that constructive knowledge must be attributed to the third defendant? The appellant also referred me to *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633. In this case, a settlement agreement had been overridden by an order of court. The court held that although the plaintiff did not know of the court order at the material time, the knowledge of its solicitor must be imputed to the plaintiff. Again, this case cannot apply to the facts of the case before me. The solicitor himself confirmed that he acted on his own volition in sending the e-mail and without the consent or authorization of the third defendant. This admission must be taken together with the fact that the solicitor himself is the first defendant, and is also acting for himself with an interest in the matter in question. Once this evidence was before the court, I did not think it was necessary for me to hear from the respondent. I therefore dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken